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No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD, PETITIONER

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, or to what extent, Title VII's anti-retaliation provision, Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-3(a), protects an employee from being dismissed because she cooperated with her employer's internal investigation of sexual harassment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Petitioner worked as a payroll coordinator for respondent for over 30 years. In the fall of 2001, respondent hired Dr. Gene Hughes as the Metro School District's employee relations director. Pet. App. 4a, 13a. In 2002, respondent, in accordance with its formal anti-harassment policy, initiated an internal investigation into Hughes's conduct after a lawyer in respondent's Legal Department learned that several employees had

"expressed concern about specific incidents of inappropriate behavior by Hughes." *Id.* at 4a.

The assistant director of human resources, Veronica Frazier, was assigned to investigate the allegations. Pet. App. 4a-5a. As part of respondent's investigation, Frazier interviewed several employees who worked with Hughes, including petitioner. *Id.* at 5a, 13a. Petitioner informed Frazier that Hughes had sexually harassed her and other employees. Specifically, petitioner reported that Hughes "had asked to see her titties on numerous occasions"; grabbed his genitals; "put his crotch up to [her] window"; and, once "came into her office * * * and he grabbed her head and pulled it to his crotch." *Id.* at 5a n.1.

The investigation did not result in any disciplinary action against Hughes. However, respondent subsequently fired petitioner, along with two other employees who alleged during the investigation that Hughes engaged in sexually harassing behavior. Pet. App. 5a. Respondent purportedly fired petitioner after accusing her of embezzlement and drug use but, according to petitioner, those accusations were unfounded. *Id.* at 5a-6a.

2. After filing a charge with the Equal Employment Opportunity Commission (EEOC), petitioner filed the instant suit, alleging that respondent violated Title VII by firing her because she disclosed Hughes's sexually harassing behavior during the internal investigation. Pet. App. 13a. The district court granted summary judgment in favor of respondent on the ground that petitioner's participation in the internal investigation of Hughes was not conduct covered by Title VII's anti-retaliation provision, Section 704(a), 42 U.S.C. 2000e-3(a). That provision makes it "an unlawful employment practice for an employer to discriminate against any of

his employees * * * [1] because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Ibid.* The first of the numbered clauses is known as the "opposition clause" and the second as "the participation clause."

Relying on Sixth Circuit precedent, the district court concluded that petitioner's participation in her employer's investigation did not fall within Title VII's *participation* clause because respondent's investigation was not conducted pursuant to a pending EEOC charge. Pet. App. 15a (citing *Abbott* v. *Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003)). The district court further held that petitioner's involvement in the internal investigation did not constitute *opposition* to an unlawful employment practice, because she "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else." *Id.* at 16a. Because there was no allegation that petitioner "instigated or initiated any complaint," the district court concluded, petitioner's activity was not opposition within the meaning of Section 704(a). *Id.* at 16a-17a.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 3a-10a. The Sixth Circuit concluded that petitioner's actions were not protected under Section 704(a)'s *opposition* clause. In so holding, the court stated that "[t]he general idea is that Title VII 'demands active, consistent "Opposing" activities to warrant * * * protection against retaliation.'" *Id.* at 7a (quoting *Bell* v. *Safety Grooving & Grinding, LP*, 107 Fed. Appx. 607, 610 (6th Cir. 2004) and citing *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 579 (6th Cir.),

cert. denied, 531 U.S. 1052 (2000)). The court further reasoned that petitioner's actions in "relating unfavorable information about Hughes" during the investigation did not qualify as "overt opposition" protected under the statute because petitioner "does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing." *Id.* at 7a-8a.

The court of appeals also held that petitioner's actions were not protected under Section 704(a)'s *participation* clause. Pet. App. 8a. The court reasoned that Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination only when that investigation occurs pursuant to a pending EEOC charge. *Ibid.* In this case, the court explained, "no EEOC charge had been filed at the time of the investigation or prior to her filing." *Ibid.*

4. Petitioner sought panel and en banc rehearing, which was denied. Pet. App. 1a-2a.

DISCUSSION

Petitioner's disclosure of discriminatory acts during respondent's internal investigation into possible sexual harassment in the workplace was protected activity under Section 704(a). The court of appeals therefore erred in holding that neither clause of Section 704(a) protected petitioner. The court of appeals' construction of Section 704(a) creates an unjustified gap in Title VII's protection against retaliation. Internal investigations are an integral aspect of Title VII and there is no reason to leave cooperating witnesses unprotected. The Sixth Circuit's rule is not only at odds with the text of Section

704(a) but with its object and the EEOC's guidance materials.

The court of appeals' decision is out of step with the precedent in other circuits, but does not squarely conflict with other circuit precedents. Nevertheless, even in the absence of a square conflict, the question presented is of sufficient importance to the effective enforcement of Title VII to warrant resolution by this Court. In particular, the court of appeals' failure to protect employees in internal investigations that precede formal complaints raises significant concerns in light of this Court's decisions in *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), which impose an affirmative duty on employers routinely to investigate allegations of sexual harassment to avoid liability or limit damages under Title VII.

Although the unpublished nature of the decision below counsels against plenary review, the court of appeals grounded its construction of Section 704(a) in prior circuit precedent in published cases, establishing general ramifications for interpreting Section 704(a), which the court in this case and in a previous unpublished case viewed as controlling in this specific context. In addition, notwithstanding that it is unpublished, the court of appeals' decision creates an inexplicable enforcement gap in Title VII for employees in the Sixth Circuit and threatens to compromise employer investigations into potential discriminatory conduct by removing a protection designed to ensure that employees will not fear reprisals for cooperating in such investigations, to the detriment of employers seeking to uncover wrongdoing as well as employees subject to such wrongdoing.

A. The Court Of Appeals Erred In Holding That Petitioner's Conduct Was Not Protected Activity Under Title VII's Anti-Retaliation Provision

1. The court of appeals erred in finding that Section 704(a) did not protect petitioner against retaliation for adverse testimony in an internal investigation that predated any filing of an EEOC charge. The United States takes the view that petitioner is protected by both the opposition and participation clauses of Section 704(a). But it makes no sense to conclude, as the court of appeals did, that petitioner is not protected by *either* clause. A cooperating witness, no less than an employee who initiates a complaint, needs protection against retaliation for providing candid information to the employer during an internal investigation.

Internal investigations, by virtue of this Court's decisions, are an integral part of Title VII's enforcement scheme. Recovery by employees and liability for employers can turn on the existence of the adoption of internal complaint policies and the extent to which the employee avails herself of such procedures. Thus, internal procedures can only play the role that the Court envisioned if employees who give candid testimony are protected against retaliation. The need for protection does not turn on whether an EEOC charge has been filed at the point the witness testifies. The court of appeals' ruling thus creates an inexplicable gap in Title VII's protection against retaliation that this Court should correct.

2. Section 704(a) protects employees from retaliation because he has "opposed" an unlawful employment practice. 42 U.S.C. 2000e-3(a). The plain meaning of the word "oppose" is "to be hostile or adverse to, as in opinion." *Random House Dictionary of the English Lan-*

guage 1359 (2d ed. 1987); *American Heritage Dictionary* 872 (1982) ("[t]o be in contention or conflict with" or "[t]o be resistant to"). When an employee communicates to her employer a belief that the employer has engaged in activity that constitutes a form of employment discrimination, that communication reasonably carries with it the employee's opposition to the activity. See 2 EEOC Compl. Man. (BNA) § 8-II(B)(1), at 614:0003 (Mar. 2003) (opposition clause "applies if an individual explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination"); *id.* § 8-II(B)(2), at 614:0003 (protected opposition occurs when a "complaint would reasonably [be] interpreted as opposition to employment discrimination"). An employee's disclosure of unlawful activity in response to the employer's investigation to root out unlawful activity is naturally viewed as opposition to that activity, because no reasonable employee welcomes discrimination in the workplace, especially when it is directed at the employee herself.

This case well illustrates the point. Respondent initiated an investigation after several employees expressed concern about sexual harassment by Hughes. Pet. App. 4a. Petitioner was interviewed as part of that investigation, and was asked in the investigation to report "any *inappropriate* behavior by Mr. Hughes." C.A. App. 46 (Dep. of Vicki Crawford) (emphasis added); accord *id.* at 47. Petitioner then reported that she had "*felt very uncomfortable* around Mr. Hughes" because he "would grab himself" whenever she would speak to him. *Id.* at 44 (emphasis added). Petitioner also reported that Hughes would respond to her question of "what's up?" by grabbing his crotch and saying "you know what's up,"

id. at 45; that he would knock on the window to her office and would press his crotch to the window," *ibid.*; that at times, "he would come to my window * * * and would say, "Let me see your titties," *ibid.*; and that he once walked into her office, and when she asked how could she help him, "he grabbed her head and pulled it to his crotch." Pet. App. 5a n.1.

Petitioner's disclosure during the interview of such reprehensible conduct unmistakably communicated her opposition to Hughes's conduct. After recounting such graphic and obviously inappropriate acts against her in response to a request to report inappropriate behavior, petitioner was not required to make explicit that she opposed such conduct before coming within Section 704(a)'s protection. The nature of the conduct described and the setting of the internal investigation sufficed to register petitioner's opposition to the conduct. Indeed, petitioner reasonably believed that by reporting Hughes's misconduct during a formal investigation, she had "testified *against*" Hughes. C.A. App. 47; accord Pet. App. 5a ("According to petitioner, she believed that she was exercising her rights under federal law when she informed Frazier of Hughes's actions."). And in any event, the Congress that passed Title VII would have assumed that employees who reported such misconduct *opposed* such misconduct. Petitioner's recital of specific instances of unlawful conduct by Hughes during the course of her employer's investigation was therefore protected activity under the opposition clause.

The court of appeals believed that the opposition clause "demands active, consistent 'Opposing' activities to warrant * * * protection against retaliation." Pet. App. 7a (quoting *Bell*, 107 Fed. Appx. at 610). But Section 704(a) protects those who "oppose[]"; the terms

"active" and "consistent" nowhere appear in the text of the statute. The court of appeals likewise engrafted an extra-textual gloss on the statute by holding that petitioner was not covered by the opposition clause because respondent initiated the interview in which petitioner complained of Hughes's harassing conduct. *Ibid.* Whether an employee receives protection under Title VII's anti-retaliation provision does not depend on whether the employee initiated an interview—instead of cooperating with an interview request—in which the employee complained of unlawful conduct. The statutory touchstone is opposition, not initiation.

Such a requirement would ignore the practical reality that many employees do not *initiate* complaints of discrimination precisely because they fear retaliation. *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1)(b) at 615:0108 n.59 (Oct. 2002) ("Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation * * * [and] a significant proportion of harassment victims are worse off after complaining.") (citations omitted); see, *e.g.*, C.A. App. 47 (petitioner's testimony that "I felt afraid that if I testified against him * * * I would lose my job"). Thus, the relevant inquiry in this context is whether the employer reasonably should have understood that the employee was disclosing an employment practice made unlawful by Title VII. 42 U.S.C. 2000e-3(a). 2 EEOC Compl. Man. (BNA) § 8-II(B)(2); accord *EEOC Interpretive Manual, Reference Manual to Title VII Law for Compliance Personnel* § 493.2 (1972) (individual protected from retaliation if "the circumstances surrounding the complaints were such that [the employer] knew or should have known

that [the individual] was complaining about Title VII discrimination."). When that criteria is satisfied, Title VII protects the employee against retaliation.

For the same reasons, Section 704(a) does not require an employee to take "further action" in opposition beyond complaining about unlawful activity to an employer. Pet. App. 7a. Voicing opposition to an employer about suspected unlawful activity constitutes protected opposition, whether or not she has filed a formal or informal complaint. See, *e.g.*, *Kotcher* v. *Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 65 (2d Cir. 1992) (opposition encompasses an individual's complaints to supervisors regardless of whether she also files an EEOC charge); *Pastran* v. *K-Mart Corp.*, 210 F.3d 1201, 1205 (10th Cir. 2000) (same); *Rollins* v. *State of Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989) (opposition clause protects "those * * * who informally voice complaints to their supervisors"); *Armstrong* v. *Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981) (same). Here again, the statutory trigger is "opposi[tion]"; the statute does not require employees to take further action, such as filing a formal a complaint, *in addition to* expressing her opposition to discriminatory conduct.

3. Although it presents a closer question, the court of appeals also erred when it held that Section 704(a)'s *participation* clause is limited to participation in an employer's internal investigation only when that investigation follows the filing of an EEOC charge. The text of the participation clause covers participation in "an investigation * * * under this subchapter." An employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is reason-

ably construed in these circumstances to be an investigation "under" the statute.

No appellate decision has limited the phrase "investigation * * * under this subchapter" to EEOC investigations. In addition, Congress elsewhere in Title VII used language making clear its intent to address only investigations conducted by the Commission. See 42 U.S.C. 2000e-5(b) ("the Commission * * * shall make an investigation" of a charge), 2000e-8 (access by Commission "[i]n connection with any investigation of a charge"), and 2000e-9 (referring to "hearings and investigations conducted by the Commission or its duly authorized agents or agencies"). The fact that Congress did not use such Commission-specific language in Section 704(a) suggests that employer-initiated investigations into conduct proscribed by Title VII would be covered. The court of appeals did not attempt to limit the participation clause to EEOC's own investigations, but did limit protection to internal investigations that follow the filing of an EEOC charge. There is no basis for that temporal limitation.

When an employer conducts an internal investigation into whether a Title VII violation has occurred, before or after the filing of an EEOC charge, the employer acts in conformity with Title VII's central objective to prevent and deter harm. See *Faragher*, 524 U.S. at 806 (Title VII's "'primary objective', like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975)); *Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the [employer's] creation of antiharassment policies and effective grievance mechanisms."); *Kolstad*, 527 U.S. at 546 (recognizing "Title VII's objective of motivat[ing] em-

ployers to detect and deter Title VII violations"); accord *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).

A rule limiting protection against retaliation in pre-charge internal investigations is difficult to square with this Court's precedents interpreting Title VII to impose an affirmative duty on employers to investigate allegations of sexual harassment to avoid liability under the statute. For example, this Court in *Faragher* and *Ellerth* held that an employer can assert an affirmative defense to avoid vicarious liability for its supervisor's unlawful employment actions that do not result in a tangible employment action if (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Likewise, in *Kolstad*, 527 U.S. at 545-546, the Court held that an employer could avoid punitive damages under Title VII by showing that the supervisor was acting contrary to the employer's good faith efforts to comply with Title VII.

An employer's investigation into allegations of conduct made unlawful by Title VII is a fundamental and indispensable component of an employer's good faith efforts to comply with Title VII through the development and implementation of anti-harassment policies and complaint procedures. See *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1), at 615:0107 (Oct. 2002) ("An anti-harassment policy and complaint procedure should contain, at a minimum * * * [a] complaint process that provides a

prompt, thorough, and impartial investigation."). In light of the importance of the internal investigation process to Title VII liability, it would make no sense to leave employees unprotected in that process. Employee cooperation is essential to making such internal investigations effective, yet employee cooperation will hardly be forthcoming if employees are unprotected against retaliation in the event they provide unfavorable information about their supervisors. Without such protection, employees will avoid negative comments about their supervisors and the internal investigation will be robbed of its value. Because employer-initiated investigations attendant to an employer's anti-harassment policies and procedures are so integral to achievement of the statutory goals of promoting employer compliance and avoiding harm, and, because those internal investigations will not perform the function envisioned by *Faragher* and *Ellerth* if the candor of cooperating employees is unprotected, such investigations are reasonably considered to be conducted pursuant to, and thus "under," Title VII.

In light of those principles, when respondent's legal department launched an investigation into Hughes's conduct, employees cooperating in that investigation were entitled to protection under the participation clause. Whether or not a victim of Hughes's conduct had filed a formal charge at the point of petitioner's interview does not change the fact that the investigation was within the purview of Title VII. Indeed, if one of respondent's employees sued respondent based on Hughes's conduct, respondent presumably would point to the investigation as part of its defense to vicarious liability. In such a case, respondent's defense under *Faragher* and *Ellerth* would not turn on whether the charge had

been filed before petitioner's interview. Employers should not be permitted to use such an investigation as a shield to liability under Title VII but at the same time as a sword to bar employees from seeking relief if they are fired in retaliation for their participation in the same interview. Such a result would flout the purpose of Title VII to "prohibit[] employer actions that are likely 'to deter victims of discrimination from complaining to' * * * their employers." *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2415 (2006) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

Moreover, such an interpretation of Section 704(a) would lead to the perverse result that employers could use investigations under facially appropriate anti-harassment policies as a means of identifying and rooting out employees who have knowledge of discrimination in the workplace, as opposed to identifying and fostering action against those who discriminate. Indeed, in this case, the employer fired three of the witnesses (including petitioner) who cooperated with the investigation, but ultimately allowed the subject of the investigation (Mr. Hughes) to remain in place. See p.2, *supra*.

For similar reasons, the court of appeals erred in concluding that protecting petitioner from retaliation under Section 704(a)'s participation clause would unjustifiably burden employers who "proactively" launch an investigation before an EEOC charge is filed. Pet. App. 10a. As discussed, this Court's decisions require proactive efforts on the part of employers regardless of whether an employee has instituted formal proceedings with the EEOC arising out of the conduct under investigation. In any event, employers have no legitimate interest in retaliating against employees who disclose conduct made unlawful under Title VII, either *before or*

after an EEOC charge is filed. And, consistent with this Court's decisions in *Faragher* and *Ellerth*, both employers and employees alike benefit from a system in which employees cooperate in internal investigations.

B. While There Is No Square Conflict, The Sixth Circuit's Decision Is An Outlier In The Circuits

1. The court of appeals' decision in this case is out of step with the decisions of other circuits on the scope of Section 704(a) and creates an inexplicable gap in the statute's prohibition against retaliation. No other circuit has adopted such a circumscribed interpretation of Section 704(a). Nevertheless, the decision is unpublished and does not create a square conflict on either the opposition or participation clause issue.

A. Although the court of appeals' decision appears to be the only appellate decision holding that the opposition clause requires active, consistent, or overt opposition to receive protection under Section 704(a), that decision does not squarely conflict with the decision of any other court of appeals.

In *EEOC* v. *Total System Services, Inc.*, 221 F.3d 1171 (2000), the Eleventh Circuit assumed, for the sake of argument, that an employee's cooperation in the employer's internal investigation was protected activity under the opposition clause. But the court did not need to resolve the issue squarely because it concluded that the district court nonetheless properly granted summary judgment for the employer on the merits. *Id.* at 1175 ("But, even if her acts might otherwise have constituted protected expression under the opposition clause, the district court was correct in granting summary judgment for Defendant."); accord *EEOC* v. *Total Sys. Servs.*, 240 F.3d 899, 904 (11th Cir. 2001) (Edmonson, J.

concurring) (observing that the panel's decision recognized that a plaintiff who participates in an employer's internal investigation "might have protection" under the opposition clause).*

As petitioner points out (Pet. 15-20), there are decisions in other circuits holding that complaints made during an employer's internal investigation constituted protected activity covered by Section 704(a), but none of those decisions specifically addresses whether the opposition clause or participation clause covered the activity and, accordingly, those cases do not directly conflict with the Sixth Circuit's analysis of the two clauses. Moreover, perhaps because they do not focus specifically on the participation clause, those decisions do not make clear whether the employer's internal investigation was being conducted pursuant to a charge filed with the EEOC, in which case the conduct would be covered under the participation clause even under the Sixth Circuit's approach. *Cardenas* v. *Massey*, 269 F.3d 251, 260, 263 (3d Cir. 2001); *Evans* v. *City of Houston*, 246 F.3d 344, 352-353 (5th Cir. 2001); *Scott* v. *County of Ramsey*, 180 F.3d 913, 916 (8th Cir. 1999). Accordingly, while those decisions are in substantial tension with the Sixth Circuit's decision, they do not squarely conflict with that decision.

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* Petitioner also suggests (Pet. 19) that district courts have construed the Eleventh Circuit's decision as holding that the *opposition* clause would cover petitioner's conduct. The decision that she cites for that proposition, *MacLean* v. *City of St. Petersburg*, 194 F. Supp. 2d 1290, 1298 (M.D. Fla. 2002), however, relies on a dissenting opinion from Judge Barkett expressing the view that such conduct would be covered by the *participation* clause. *EEOC* v. *Total Sys. Servs.*, 240 F.3d at 903 (Barkett, J., dissenting).

Petitioner also relies on decisions (Pet. 15-17) in which the activity likely would have constituted opposition activity under the Sixth Circuit's stringent "active" opposition test. Thus, in *Cardenas*, 269 F.3d at 260, the plaintiff not only supported the discrimination complaints of his co-workers but filed his *own* complaint alleging discrimination. In *Kempcke* v. *Monsanto Co.*, 132 F.3d 442, 445 (8th Cir. 1998), the plaintiff gave arguably incriminating documents to his attorney and told his employer if it wanted the documents returned it would have to deal with his attorney. And in *Hoffman* v. *Rubin*, 193 F.3d 959, 963 (8th Cir. 1999), the court assumed, but did not hold, that the plaintiff's appearance on the show "60 Minutes" was oppositional activity. While the courts found that the employees were covered by Section 704(a) in those circumstances, those cases did not squarely address the more typical fact pattern here, in which an employee who has not yet filed an EEOC charge cooperates with an employer's investigation.

Petitioner also argues (Pet. 19-20) that the Seventh Circuit in *McDonnell* v. *Cisneros*, 84 F.3d 256 (1996), rejected the view that the opposition clause only protects "active" opposition. In *McDonnell*, the employee claimed he was being retaliated against for "failing to carry out his employer's desire that he prevent his subordinates from filing discrimination complaints." *Id.* at 262. The court concluded that the employee's failure to act amounted to "[p]assive resistance" but was nonetheless covered by the opposition clause. *Ibid.* In *McDonnell*, however, the Seventh Circuit did not confront whether an employee's cooperation with an internal investigation constitutes protected activity.

b. There is likewise no circuit conflict on the question whether the participation clause requires the filing

of an EEOC charge in order for an employer's internal investigation to constitute an "investigation * * * under this subchapter." 42 U.S.C. 2000e-3(a). On this issue, the Sixth Circuit's view is in line with the decisions of other circuits that likewise have concluded that the participation clause is triggered only after an EEOC charge has been filed. *Abbott*, 348 F.3d at 543; *EEOC* v. *Total Sys. Serv.*, 221 F.3d at 1174 n.2; *Byers* v. *Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *Brower* v. *Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999); *Vasconcelos* v. *Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *Booker* v. *Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

C. The Question Whether Petitioner Is Protected Under Title VII's Anti-Retaliation Provision Is An Important And Recurring Issue That Warrants This Court's Review

Although there is no square circuit conflict on the meaning of either Section 704(a)'s opposition clause or the participation clause, the question whether an employee in petitioner's circumstance is covered under Section 704(a) is of core importance to the effective enforcement of Title VII and of recurring significance. The decision below creates an inexplicable gap in Title VII's anti-retaliation provision. In light of the integral role internal investigations play in Title VII even before a charge is filed, it makes no sense to conclude that employees are protected by neither clause of Section 704(a). If the decision below is correct, there is every reason to think that Congress would want to act promptly to correct the anomaly. Accordingly, there is little reason to leave employees in the Sixth Circuit unprotected while awaiting a square conflict, or a published decision correcting the error in this case. More-

over, because the decision below squarely addressed both clauses, it presents a suitable vehicle to consider the question.

1. The court of appeals held that Title VII gives no protection to employees who are retaliated against for disclosing discriminatory conduct during employer-initiated investigations, at least in the absence of an EEOC charge. That result imposes a significant and unwarranted limitation on the types of conduct that Title VII is intended to protect. As this Court recently explained in *White*, 126 S. Ct. at 2412, the purpose of the anti-retaliation provision is to secure a discrimination-free workplace "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees." Title VII thus "forbids discrimination against * * * employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796 (1973). This Court's precedents accordingly hold that Title VII should be interpreted to "assure * * * cooperation" from employees in achieving Title VII's objectives. *White*, 126 S. Ct. at 2414.

Effective enforcement of Title VII's protections depends "upon the cooperation of employees who are willing to * * * act as witnesses" and who feel "free to approach officials with their grievances." *White*, 126 S. Ct. at 2414 (quoting *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). In the absence of protection against retaliation, witnesses and victims would be understandably reluctant to participate in an investigation into unlawful conduct, which, in turn, would undermine Title VII's purpose to spur employers' efforts to deter and detect unlawful discrimination in the

workplace. And the court of appeals' decision unjustifiably puts an employee asked to disclose specific incidents of unlawful discrimination in a pre-charge internal investigation in an untenable position. The employee risks retaliation for disclosing the unlawful activity or for refusing to cooperate with the employer's investigation. The only safe course for the employee would be to provide only innocuous information about the supervisor, even when discrimination is rampant. No employee should be placed in that position. Nor should any employer welcome a system in which employees have a disincentive—*i.e.*, the possibility of retaliation not covered by Title VII—to cooperate with ongoing investigations designed to root out discrimination and, thus, avoid potential liability under Title VII. Accordingly, both employers and employees would benefit from guidance from this Court on the question presented.

2. The question of whether Title VII's anti-retaliation provision protects an employee's disclosure of unlawful conduct during an employer-initiated investigation has arisen with increasing frequency, and has taken on greater importance, following this Court's decisions in *Ellerth*, *Faragher*, and *Kolstad*. As discussed, those decisions create strong incentives for employers to implement policies and procedures that would identify and correct instances of unlawful discrimination as a means to avoid liability or limit damages under Title VII; employees also must avail themselves of such procedures in order to obtain relief under Title VII's anti-discrimination provisions.

Not surprisingly, employers have responded to the decisions by implementing or expanding their policies and internal complaint procedures. See, *e.g.*, Amicus Chamber of Commerce Br. at *2, *Pennsylvania State*

Police v. *Suders*, 542 U.S. 129 (2004) (No. 03-95) ("Following this Court's decisions in *Faragher* and *Ellerth* * * *, employers have made great strides in * * * implementing zero-tolerance policies, establishing user-friendly, effective internal complaint procedures, and vigorously investigating complaints of sexual and other harassment in the workplace."); Jathan W. Janove, *The Faragher/Ellerth Decision Tree*, 48 HR Mag. (Sept. 2003) ("There is no question that [*Faragher* and *Ellerth*] have increased employer understanding of the importance of preventive measures. They have contributed to the development of sound anti-harassment policies [and] procedures.").

As employers have begun routinely to conduct investigations into sexual harassment in the workplace, it is essential that a clear rule is established to determine whether Title VII protects an employee from retaliation because she discloses unlawful conduct during the course of the employer's investigation. The framework envisioned by *Ellerth*, *Faragher*, and *Kolstad*, *supra*, depends on participation and truthful cooperation by employees during employer-sponsored investigations. If employees are afraid to report instances of harassment or to participate in employer investigations out of fear of retaliation, employers may not become fully aware of harassment, thereby preventing them from taking corrective action. Moreover, because employee participation in employer-instituted procedures and corollary investigations can, in essence, be a prerequisite to the employee's assertion of Title VII rights, coverage of such participation is equally necessary to achieve "'unfettered access' to Title VII's remedial mechanisms." *White*, 126 S. Ct. at 2415 (quoting *Robinson*, 519 U.S. at 346). Encouraging employers to conduct internal inves-

tigations and requiring employees to comply with those procedures, but then denying protection against retaliation to employees who disclose unlawful conduct in the course of such investigations, would frustrate the purposes of Title VII as contemplated by this Court.

The court of appeals observed that an employer that retaliates against an employee who has participated in an internal investigation might be acting unreasonably and would risk losing its affirmative defense to a claim under Title VII's anti-discrimination provisions. Pet. App. 9a-10a. That observation offers no relief, however, to the victims of *retaliation* who would have no cause of action to vindicate that distinct injury under the statute. And if no victim of harassment files suit (*e.g.*, out of fear of reprisal), both the harassment and the retaliation would occur without redress. Moreover, the court of appeals' exclusive focus on the *employer's* motivations ignores the obvious chilling effect that its rule would have on an employee's willingness to cooperate with the employer's investigation.

3. The fact that the Sixth Circuit's decision is unpublished would normally counsel heavily against plenary review. Here, however, it appears that the decision reflects an entrenched view in the circuit. The decision in this case itself relies on a published decision, *Johnson*, 215 F.3d at 579, as well as on a previous unpublished Sixth Circuit decision issued several years ago, *Bell*, 107 Fed. Appx. at 610, that articulated a narrow standard for protection under the opposition clause. Pet. App. 7a. *Bell*, 107 Fed. Appx. at 610, in turn, expressed the view that published circuit precedent, including *Johnson*, "demands active, consistent 'opposing' activities to warrant [Section 704(a)] protection against retaliation." Accordingly, the Sixth Circuit has twice indicated that

it views circuit precedent as requiring that the opposition clause demand "active" and "consistent" activities in addition to opposition to unlawful activity. And as to the participation clause, the decision here relies on a published decision of the circuit. Pet. App. 7a-8a. Moreover, petitioner filed a petition for rehearing and rehearing en banc, with no success.

While the unpublished nature of the decision below and the absence of any published Sixth Circuit precedent on the particular application of the opposition clause at issue in this case would normally counsel against certiorari, the unpublished decision in this case is built on existing precedent (including another unpublished decision) that makes it likely that the decision will have staying power, and, in the meantime, the decision creates an anomalous gap in Title VII's enforcement scheme. On balance, this Court's certiorari jurisdiction is warranted to resolve the important question presented concerning the proper enforcement of Title VII. See, *e.g.*, *NLRB* v. *Scrivener*, 405 U.S. 117, 118 (1972) (observing that certiorari was granted to review scope of retaliation provision under National Labor Relations Act, 29 U.S.C. 157, because it "appeared to have an important impact on the administration of the Act").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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